81-2264

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ALEXANDER L. STEVAS,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDWARD LONEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Were Petitioner's Fourth Amendment rights violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest and reduced to the agent's exclusive control.**

II. **Were Petitioner's Fourth Amendment rights violated when federal agents analyzed, without a warrant, the contents of a bottle seized from his van.**

III. **Was Petitioner denied due process of law and the right of confrontation when the District Court admitted statements of his alleged co-conspirator without independent non-hearsay evidence of the existence of the conspiracy and Petitioner's participation therein.**

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 16, 1982 and reconsideration thereof was denied on May 10, 1982. This Court's jurisdiction is invoked pursuant to the provisions of Title 28, U.S. Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule of Criminal Procedure 104(a):

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule of Criminal Procedure 403:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule of Criminal Procedure 801(d)(2)(E):

> (d) Statements which are not hearsay. A statement is not hearsay if— . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . .
>
> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

HISTORY OF THE CASE

The indictment herein charged Petitioner LONEY with conspiring to distribute methamphetamine on October 29, 1981, and with distributing same on that date, in violation of 21 U.S.C. §841 and §846, (A12-13).

After denial of LONEY'S pre-trial Motion to Suppress, (A14), a jury trial resulted in a hung jury. LONEY thereafter moved to dismiss the indictment on double jeopardy grounds and because evidence exculpatory to him had been destroyed. The District Court denied the motion and LONEY appealed pre-trial to the Court of

Appeals, (#80-1485). On September 16, 1981, a Judgment Order was entered by the Court of Appeals affirming the judgment of the District Court on the first issue and dismissing the appeal as to the second issue for lack of jurisdiction. A Petition for Writ of Certiorari was denied by this Court on November 17, 1980. (#80-619).

Thereafter, LONEY was retried and convicted of both offenses. Post-trial motions were timely filed, (A15-16), and denied, (A24-28). On April 28, 1981, LONEY was sentenced to five years' imprisonment on each count to run concurrently. LONEY timely appealed the Judgment of Sentence to the Court of Appeals for the Third Circuit. On February 16, 1982, the Court of Appeals entered an Order affirming the Judgment of the District Court, (A1-2).

On March 2, 1982, LONEY filed a Petition for Rehearing and Suggestion for Rehearing En Banc, (A6-7). While the petition was pending, counsel sought by way of letter dated March 12, 1982, (A10), to advise the Court of Appeals of the pendency of *United States v. Ross*, No. 80-2209, before this Court, inasmuch as it appeared (and continues to appear) that the Court's opinion in that matter will have direct bearing upon the Fourth Amendment issues raised in LONEY'S appeal. By order dated March 15, 1982, the Court of Appeals denied rehearing (A11). On March 19, 1982, LONEY filed a Suggestion for Rehearing or Rehearing En Banc Based on Pendency of Controlling Case Argued Before Supreme Court on March 1, 1982, since the Court of Appeals did not have the opportunity to consider counsel's letter of May 12, 1982, before entering its Order on March 15, 1982 denying rehearing. On May 10, 1982, the Court of Appeals again denied rehearing (A3).

STATEMENT OF FACTS

The government presented a case of circumstantial evidence against LONEY; no witness testified under oath as to personal knowledge or direct observation of LONEY'S involvement in the offenses charged.

JOSEPH PELLIGRINI, a paid government informant, testified that on the morning of October 29, 1979, he arranged to purchase two ounces of methamphetamine from JOAN BAISCH, who phoned the order into "Eddy" using a number she had gotten from a circular for "Ed's Steaks". She told PELLIGRINI that "Eddy" would bring the drugs later that day. PELLIGRINI gave her $2,400.00 (in marked money) to make the buy. During the day, PELLIGRINI contacted BAISCH several times and was told the drugs were on the way. The house was kept under surveillance during the entire day by DEA Agents. LONEY, who had also been kept under surveillance all day, eventually entered BAISCH'S residence, stayed about ten minutes and left. After LONEY was seen leaving, PELLIGRINI again went into the house and obtained the drugs from BAISCH, at which time she asked him if he had seen "Eddy" leave.

When the deal between BAISCH and PELLIGRINI had been completed, Agents at the scene radioed other agents following LONEY; LONEY'S vehicle was then stopped and he was arrested.

A search incident to the arrest resulted in the seizure from LONEY'S person of $2000 of the marked $2400 used in the drug purchase and an unmarked gallon bottle of liquid from the vehicle, (A18-19). LONEY was taken into custody, and his wallet, papers and other personal effects were retained by the agents. BAISCH was arrested in her house, at which time she was found to be in possession of a small quantity of methamphetamine and the remaining $400 in marked bills. Later that evening, after LONEY was securely in custody, the case agent went through his wallet looking for "intelli-

gence", (A22), and found several pieces of paper containing chemical names and formulae, (A19). The next day, he removed some shredded tin foil from the floor of the vehicle, (A19).

At trial, a government witness was permitted to testify over defense objection that the bottle contained P2P and that P2P was used in the manufacture of methamphetamine. He further testified that one of the chemical formulae found in LONEY's wallet was for P2P, and that another formula was for a chemical that was also used in the manufacture of methamphetamine, as was shredded tin foil.

REASONS FOR GRANTING THE WRIT

I. Petitioner's Fourth Amendment rights were violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest and reduced to the agent's exclusive control.

The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967); more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy. In *United States v. Chadwick*, 433 U.S. 1, (1977), this Court held that the expectation of privacy reasonably extended to a footlocker seized incident to arrest, and in *Arkansas v. Sanders*, 442 U.S. 753 (1979), held that such protection extended to the contents of an unlocked suitcase seized from an automobile at the time of arrest.

The factual situation in this case is similar to that in *Chadwick*, supra. There, federal agents arrested suspected drug couriers at a train station on the basis of probable cause to believe their foot locker contained marijuana, and took the suspects and the locker to their office where they searched it without a warrant and without any exigent circumstances calling for an imme-

diate search. The Supreme Court held that the warrantless search violated the Fourth Amendment Warrant Clause, saying:

> "However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest.' *Preston v. United States*, 376 U.S., at 367, 84 S.Ct., at 883, or no exigency exists . . . Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency . . . In our view, when no exigency is shown to support the need for an immediate search the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 433 U.S., at 2485-2486

Here, the government seeks to distinguish *Chadwick* on the ground that the wallet is not "luggage" as defined in the context of that case. No less than luggage is a person's wallet intended as a repository of personal effects. Certainly, possessions carried in a wallet on the person are due no less protection by the Fourth Amendment Warrant Clause than those placed in a footlocker, *United States v. Chadwick*, supra; a suitcase, *Arkansas v. Sanders*, supra; an attaché case, *United States v. Jackson*, 576 F.2d 749 (CA 8, 1978); or a briefcase, *United States v. Schleis*, 582 F.2d 1166 (CA 8, 1978). See *United States v. Marchand*, 564 F.2d 983 (CA 2, 1977); cert. denied, 434 U.S. 1015 (1978), in which the Court held that police must obtain a warrant before opening a wallet found in plain view and extracting a driver's license therefrom. See also *United States v. Jankowski*, 470 F.Supp. 464 (W.D. Pa., 1979).

By placing his papers inside his wallet, LONEY clearly, in the language of *Chadwick*, "manifested an expectation that the contents would remain free from public examination." 433 U.S., at 11. Moreover, LONEY retained personal possession of the wallet, thus manifesting an even greater expectation of privacy then if he had relinquished possession to a common carrier for shipping as in *Chadwick*, or by placing the brief case on the back seat of a motor vehicle, as in *Schleis*.

The government has sought to justify the search of LONEY'S wallet under the rationale of *United States v. Edwards*, 415 U.S. 800 (1974), which permitted a post-arrest seizure of the clothing of an arrestee. In *Edwards*, the Supreme Court approved an evidentiary search at the station house, of clothing which the defendant was still wearing ten hours after his arrest, where the officers had probable cause to believe that the clothing contained evidence of crime, thus rendering it subject to search at the time of his arrest. The government here reasons that the search of LONEY'S wallet would have been proper at the time and place of the arrest and, it was therefore permissible under the standards enunciated in *Edwards*.

Indeed, some of the language in *Edwards* suggests that any items that could be searched at the time of the arrest could be searched at *any* time after the arrest, viz:

> "(O)nce the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other." 415 U.S., at 807.

However, a close reading of that opinion indicates that the Supreme Court was referring only to searches of

effects still in the defendant's possession and control at the place of detention. See *United States v. Schleis*, supra.

Moreover, two other significant facts distinguish this case from *Edwards:* First, the contents of LONEY'S wallet in police custody were not subject to the same risk of loss as were the paint chips on clothing still being worn by EDWARDS; Second, while there was cause to believe that EDWARDS' clothing contained paint chips from the window through which he had allegedly crawled, there was no reason to believe that LONEY'S wallet contained evidence of crime, since all of the marked money had been retrieved by the time the wallet was searched.

Clearly, *Edwards* is inapposite here and the warrantless search of LONEY'S wallet at a time when he was securely in custody and his wallet in the agent's possession was not justified. *United States v. Benson*, 631 F.2d 1336 (CA 8, 1980); *United States v. Graham*, 638 F.2d 1111 (CA 7, 1981); *United States v. Jankowski*, supra.

The government may look to the Supreme Court's recent decision in *New York v. Belton*, ____ U.S. ____, 29 CrL 3124 (1981), to buttress its argument that the search of LONEY'S wallet was lawful. In that case, the Court upheld the actions of a police officer in seaching the zippered pockets of a jacket found in the passenger compartment of an automobile, contemporaneous with the arrest of the occupants thereof. In actuality, that decision advances LONEY'S position: in holding that closed containers within an arrestee's reach may be searched, the Court made it clear that, in order to be justified as incident to arrest, such searches must be conducted substantially contemporaneous with the arrest, and not at some later point in time.

The application of *Chadwick* and its progeny to the facts of this case leads to the inescapable conclusion that LONEY had a reasonable expectation of privacy in the

contents of his wallet, and that the warrantless search thereof cannot be viewed as incident to this arrest or justified by any other exigent circumstances, and such search was, therefore, a violation of his Fourth Amendment rights, the fruits of which illegal search must be suppressed.[1]

II. Petitioner's Fourth Amendment rights were violated when federal agents analyzed, without a warrant, the contents of a bottle seized from his van.

The determination that probable cause existed for LONEY'S arrest and the search of his vehicle incident thereto is not dispositive of the legality *vel non* of the analysis of the contents of a bottle found in the van. Nor is the permissibility of a warrantless inventory search of the vehicle conclusive as to that issue. *United States v. Chadwick*, supra; *United States v. Bush*, 647 F.2d 357 (CA 3, 1981). Thus, it is necessary to determine whether LONEY had a reasonable expectation of privacy in the contents of the bottle which would have precluded the analysis thereof without a warrant.[2]

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1. The government may attempt to justify the warrantless search herein as a valid inventory search under *South Dakota v. Opperman*, 428 U.S. 364 (1976). However, the record clearly establishes beyond doubt that the officer was seeking intelligence, not inventory; and that no inventory was ever made, (A22). Further, the government's interest in making an inventory could have been accomplished by placing the wallet in a sealed envelope and inventorying same as a unit. There was no necessity to open the wallet to inventory the contents. Accord, *United States v. Schleis*, supra; *United States v. Davis*, 501 F.Supp. 23 (N.D. Ga., 1980).

2. At first blush, it may appear that *New York v. Belton*, supra, defeats LONEY'S argument without regard to the reasonableness of his expectation of privacy in the contents of the bottle. However, that decision has no bearing on the issue here inasmuch as even if the seizure of the bottle was lawful, the agents had no probable cause to believe that the bottle or its contents constituted contraband, fruits or instrumentalities of crime, or evidence thereof, and therefore, there was no reason to make any further search of the bottle. See *Note* 3, infra.

In *Robbins v. California*, ____ U.S. ____, 29 CrL 3115 (1981), the Supreme Court held that the Fourth Amendment protects the contents of any closed container, regardless of the nature thereof, unless its contents are obvious to the observer. Also see *United States v. Ross*, 655 F.2d 1159 (CA D.C., 1981) cert. granted ____ U.S. ____, 30 CrL 4029 (1981). Thus, there can be no doubt that a glass bottle is within the class of protected containers, unless the nature of its contents are revealed thereby.

Here, the bottle was capped and it bore no label. Even though transparent it yielded no information about its contents other than that they were liquid.[3] In this regard, the bottle merits no less protection than a soft suitcase that reveals its contents as solid objects, so long as the shape of the objects do not define their nature. *Robbins v. California*, supra.

Accordingly, regardless of the agents' right to seize the bottle, they had an obligation to obtain judicial authority before searching it, i.e., analyzing the contents thereof, and the fruits of such search should have been suppressed.

III. Petitioner was denied due process of law and the right of confrontation when the District Court admitted statements of his alleged co-conspirator without independent non-hearsay evidence of the existence of the conspiracy and Petitioner's participation therein.

BAISCH'S out-of-court statements were admissible (over Defendant's repeated objections) only if they fall

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3. In its opinion on the suppression issue, the Court found probable cause to seize the bottle based upon, *inter alia*, the agent's professional familiarity with the visual appearance of the chemical P2P. . ." No such testimony was offered at the suppression hearing, however, when the only references to the seizure of the bottle were (1) that "a gallon bottle of liquid was seized from the van", (A20), and (2) that it was found in plain view, (A21).

within the co-conspirator exception embodied in *Federal Rule of Evidence 801(d)(2)(E)*. In order to avail itself of that exception the government must prove, by a preponderance of the evidence independent of the hearsay, that a conspiracy existed *and* that the defendant was a member thereof. *United States v. Continental Group, Inc.*, 603 F.2d 444 (CA 3, 1979); *United States v. Trotter*, 529 F.2d 806 (CA 3, 1976). It is the responsibility of the judge, rather than the jury, to determine whether the government has met its burden. *United States v. Trowery*, 542 F.2d 623 (CA 3, 1976); *Federal Rule of Evidence 104*.

Here, the only conspiracy as to which proof was presented at trial was the conspiracy alleged in the indictment between LONEY and BAISCH to sell drugs to the informant. Thus BAISCH'S statements are admissible only if there was sufficient independent proof of *that* conspiracy.

The non-hearsay evidence introduced against LONEY was that he went to BAISCH'S home shortly before the transfer of drugs took place and that at the time of arrest, he had $2000 of the marked money given to BAISCH by the informant in his possession, (N/T, 1/14/81, pp. 9-30). While this evidence may show that LONEY sold drugs to BAISCH, it gives no indication whatsoever of LONEY'S participation in an agreement to resell those drugs to a third party.[4]

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4. The government may not argue that the independent evidence of an agreement by LONEY and BAISCH to consummate a drug transaction between themselves supports admission of the hearsay, since no joint enterprise is involved in the mere agreement to sell what another agrees to buy. *United States v. Mancillas*, 580 F.2d 1301 (CA 7, 1978). Moreover, such a result flies in the face of the rationale underlying the co-conspirator exception, i.e., by becoming a member of the conspiracy, a person authorizes his co-conspirators to speak on his behalf with regard to matters concerning the conspiracy. In a drug sale, as with any other business transaction, the buyer and seller are, if anything, adversaries, and not agents of each other.

The facts in *United States v. Nelson*, 603 F.2d 42 (CA 8, 1979) provide a pertinent example of the type of independent evidence necessary to establish the participation of the seller of drugs in a conspiracy with his buyer to redistribute those drugs to third parties. In that case, there was evidence that the defendant had sold drugs to one WEBB, who very shortly thereafter resold the drugs to BARTON. The government offered the hearsay statements of alleged co-conspirators, DORSEY, WEBB and BARTON in order to prove a conspiracy between NELSON and WEBB to distribute drugs to BARTON. The alleged co-conspirators testified at trial as follows:

> DORSEY said that he bought heroin from REECE and that he met NELSON at REECE'S apartment and discussed buying heroin from NELSON, in REECE'S presence. DORSEY then began buying heroin from NELSON for his own use and for resale to others, including WEBB and BARTON; WEBB testified that he had bought heroin from REECE and DORSEY for his personal use and for resale to others. Pursuant to NELSON'S request that WEBB sell heroin for him, WEBB began buying heroin from NELSON for his own use and for resale to others, including BARTON who he had met through REECE; BARTON testified that she had met DORSEY and WEBB through REECE and that she had bought heroin from all three of them for her personal use and for resale to others.

Thus, in *Nelson* there was independent evidence not only that NELSON, REECE, DORSEY, WEBB and BARTON were involved in a conspiracy to distribute heroin among themselves, but also that the conspiracy specifically contemplated resale of heroin to others. Indeed, there was an explicit agreement between NELSON and WEBB that WEBB act as a conduit for the resale of NELSON'S heroin. Here, there is no such inde-

pendent evidence of a conspiracy, i.e., there is no indication that LONEY had any concern or interest in BAISCH'S disposition of the drugs allegedly sold by him to her, and BAISCH'S out-of-court statements to that effect should have been excluded.

Even assuming BAISCH'S out-of-court statements were admissible against LONEY under *Federal Rule of Evidence 801(d)(2)(E);* the admission into evidence of such statements clearly deprived LONEY of his Sixth Amendment right of confrontation with regard thereto, as interpreted in *Bruton v. United States*, 391 U.S. 123 (1968). BRUTON specifically left open the question whether or not the co-conspirator exception is violative of the Sixth Amendment right of confrontation, 391 U.S., at 128, n.3. In *Dutton v. Evans*, 400 U.S. 74 (1970), the Court held that the Sixth Amendment permitted the use of such statements if inherently reliable and neither crucial nor devastating to defendant's case. Admissibility under the co-conspirator exception does not, however, automatically demonstrate compliance with the confrontation clause. *United States v. Eaglin*, 571 F.2d 1069 (CA 9, 1977), cert. denied, 435 U.S. 906 (1978).

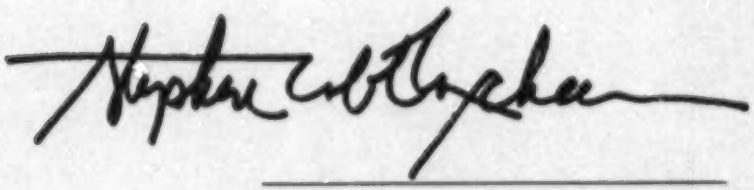
Here, the non-testifying BAISCH was in fact the principal witness against LONEY, insofar as her statements provide the only direct evidence of LONEY'S participation in the offenses charged. Indeed, without those statements the remaining evidence was insufficient to sustain a conviction. *United States v. Mancillas*, 580 F.2d 1301 (CA 7, 1978).

Thus, BAISCH'S out-of-court declarations were crucial to the government's case, and by admission thereof LONEY was deprived of the right to confront the principal witness against him in violation of the Sixth Amendment and, therefore, evidence of BAISCH'S out-of-court statements should have been excluded, as being more prejudicial than probative. *Federal Rule of Evidence 403.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Third Circuit, which affirmed without discussion a Judgment of the United States District Court for the Eastern District of Pennsylvania.

Respectfully Submitted,



STEPHEN ROBERT LACHEEN
ANNE M. DIXON
Attorneys for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1863

UNITED STATES OF AMERICA
v.
LONEY, EDWARD
Appellant

Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Criminal No. 79-00250-02)

Argued January 12, 1982
Before HUNTER, HIGGINBOTHAM, *Circuit Judges*,
and ACKERMAN,* *District Judge*

---

*Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the court erred in:

1. failing to suppress the fruits of unconstitutional, warrantless searches;
2. improperly admitting evidence tending to show appellant's quilt of an offense for which he was not charged;
3. improperly admitting statements of appellant's alleged co-conspirator without independent non-hearsay evidence of the existence of the conspiracy and appellant's participation therein;
4. improperly admitting evidence concerning a bottle and the contents thereof seized from appellant when the bottle and contents had been destroyed by government agents;
5. improperly charging the jury as to the law of conspiracy,

It is ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

By The Court,

James Hunter, III, *Circuit Judge*

Attest:

Sally Mrvos, *Clerk*

Feb. 16, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1863

UNITED STATES OF AMERICA,
v.
LONEY, EDWARD,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By The Court,

James Hunter, III, *Judge*

May 10, 1982

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER
v.	:	81-1863
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

SUGGESTION FOR REHEARING OR REHEARING EN BANC BASED ON PENDENCY OF CONTROLLING CASE ARGUED BEFORE SUPREME COURT ON MARCH 1, 1982

Appellant, by counsel, respectfully represents:

1. That, Appellant incorporates herein by reference the arguments set forth in the Petition for Rehearing and Suggestion for Rehearing En Banc filed on March 2, 1982, a copy of which is attached hereto as Exhibit "A".

2. That, by letter dated March 12, 1982, Appellant sought to advise This Court that the Supreme Court's future opinion in *United States v. Ross*, 30 Crl 2435, a matter in which argument was hearing on March 1, 1982, would most certainly bear directly upon the Fourth Amendment issues raised in this appeal, inasmuch as that matter also involves a container search conducted at a time when the container was in exclusive police control. A copy of counsel's letter dated March 12, 1982 is attached hereto as Exhibit "B".

3. That, Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by Order dated March 15, 1982, a copy of which is attached hereto as Exhibit "C".

4. That, since counsel's letter of March 12, 1982 would not have reached the Clerk until March 15, 1982, it is obvious that the Court did not have the opportunity to consider that letter before entering its Order dated March 15, 1982.

WHEREFORE, Appellant respectfully requests that this case be reheard so that the Court may reconsider this matter in light of the Supreme Court's future opinion in *United States v. Ross*.

STEPHEN ROBERT LaCHEEN
Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER 81-1863
v.	:	
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appellant, by counsel, respectfully represents:

1. That, on February 16, 1982 a panel of This Court affirmed the judgment sentence entered by the District Court in the above matter.

2. That, Appellant respectfully petitions This Court for a rehearing of the appeal, to submit once again the argued position on the issues raised therein and, in particular, to call the Court's attention to the following matters:

(a) Appellant's Fourth Amendment rights were violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest, at a time when it was in the agents' exclusive control. The sweep of a lawful search incident to arrest is not so broad as to permit a search of a wallet, a repository of personal effects in which there is a reasonable expectation of privacy, several hours after it has been reduced to the exclusive control of federal agents, where there is no reason whatsoever to believe that it contained weapons, contraband or evidence of crime.

(b) Appellant's Fourth Amendment rights were violated when federal agents analyzed, without a warrant, the contents of a bottle seized from his van. Although the agents may have had a right

tc seize the bottle, they had no right to search it without a warrant, since the nature of its contents were not obvious.

(c) Appellant's due process rights were violated when the hearsay statements of his alleged co-conspirator were admitted without independent non-hearsay evidence of the existence of the conspiracy and the Appellant's participation therein. In this case the indictment charges a conspiracy between Appellant and another to sell drugs to an informant. The independent evidence tended to show only that Appellant sold drugs to his alleged co-conspirator; there was no non-hearsay evidence to suggest Appellant's participation in a broader conspiracy to distribute those drugs to third parties.

3. That, the errors complained of can in no way be deemed harmless inasmuch as a prior trial in this matter resulted in a hung jury.

4. That, the Supreme Court has scheduled argument in the matter of *United States v. Ross*, in which the Opinion below is reported at 655 F.2d 1159 (C.A.D.C. 1981). That matter involved the station-house search of a zippered leather pouch and paper bag found during the search of a car trunk. The Supreme Court's Opinion in that case may well shed considerable light upon the Fourth Amendment issues involved in this appeal.

WHEREFORE, Appellant respectfully requests that this case be reheard and suggests that such rehearing be before the Court *en banc*.

STEPHEN ROBERT LACHEEN
Attorney for Appellant

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER
v.	:	81 - 1863
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to wit, the panel's decision is contrary to the decision of This Court or the Supreme Court in *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), *New York v. Belton*, __ U.S. __, 29 CrL 3124 (1981), *Robbins v. California* __ U.S. __, 29 CrL 3115 (1981).

STEPHEN ROBERT LaCHEEN
Attorney for Appellant

Exhibit A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA	:	NUMBER
v.	:	81 - 1863
EDWARD LONEY, Appellant	:	(CRIMINAL CASE)

CERTIFICATIONS

I HEREBY CERTIFY that I have served two copies of the foregoing Petition for Hearing and Suggestion for Rehearing En Banc upon MARY C. SPEARING, ESQUIRE, Assistant U.S. Attorney, 3310 U.S. Court House, 601 Market Street, Philadelphia, Pennsylvania, 19106, by mailing them postage prepaid, on this date.

I HEREBY CERTIFY that I am a member of the Bar of This Court.

STEPHEN ROBERT LaCHEEN
Attorney for Appellant

March 2, 1982

Exhibit A

LaCHEEN & ALVA
ATTORNEYS AND COUNSELLORS AT LAW

*STEPHEN ROBERT LA CHEEN
DANIEL-PAUL ALVA
ANNE M. DIXON
BARNABY C. WITTELS
KENNETH M. DUBROW

31st FLOOR LEWIS TOWER BUILDING
15TH AND LOCUST STREETS
PHILADELPHIA, PENNSYLVANIA 19102

(215) 735-5800

*Member Florida Bar also

March 12, 1982

Sally Mrvos, Clerk
U.S. Court of Appeals
21400 U.S. Court House
601 Market Street
Philadelphia, Pa. 19106

Re: U.S.A. v. Edward Loney
C.A. #81-1863

Dear Mrs. Mrvos:

In the Petition for Rehearing filed in the above matter, I suggested that the Supreme Court's future decision in *United States v. Ross* may be dispositive of the Fourth Amendment issues presented in this appeal.

In this connection, I would like to point out to the Court that the Ross matter has now been argued in the Supreme Court and that one of the focal points of the argument was that the search was conducted at a time when the container was in the exclusive police control. *See 30 CrL.* 2425, March 10, 1982.

Thus, it appears most certain that the opinion in *United States v. Ross* will bear directly on the Fourth Amendment issues in this case.

Thank you.

Very truly yours,

ANNE M. DIXON

AMD/c
cc: Hon. James Hunter, III
Hon. A. Leon Higginbotham, Jr.
Hon. Harold A. Ackerman
Mary C. Spearing, Esquire, AUSA

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1863

UNITED STATES OF AMERICA
v.
LONEY, EDWARD,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

James Hunter, III, Judge

March 15, 1982

Exhibit C

PFV:RRS:dad
File No.: 79-1225

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	: CRIMINAL NO.:
v.	: 79-250
JOAN BAISCH	: DATE FILED:
EDWARD LONEY	: VIOLATION: 21
	:U.S.C. §841(a) (1)
	: Distribution of a
	: Controlled Sub-
	: stance—1 Count
	: 21 U.S.C. §846
	: (Conspiracy to
	: Distribute a Con-
	: trolled Substance
	: — 1 Count)

INDICTMENT

THE GRAND JURY CHARGES THAT:

On or about October 29, 1979, at Philadelphia, in the Eastern District of Pennsylvania, EDWARD LONEY and JOAN BAISCH, knowingly and intentionally did unlawfully distribute approximately 55.39 grams of methamphetamine, a Schedule II non-narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841 (a) (1), and Title 18, United States Code, Section 2 (a).

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 29, 1979, at Philadelphia, in the Eastern District of Pennsylvania, the defendants, JOAN BAISCH and EDWARD LONEY, wilfully and knowingly did combine, conspire, confederate and agree

to distribute methamphetamine, a Schedule II non-narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841 (a) (1).

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts in the Eastern District of Pennsylvania:

1. On or about October 29, 1979, at Philadelphia, JOAN BAISCH met with Joseph Pellegrini and negotiated a sale of methamphetamine.

2. On or about October 29, 1979, EDWARD LONEY met with JOAN BAISCH at the residence of JOAN BAISCH, 9250 Angus Place, Philadelphia, Pennsylvania.

3. On or about October 29, 1979, at Philadelphia, JOAN BAISCH met with Joseph Pellegrini a the residence of JOAN BAISCH, 9250 Angus Place, Philadelphia, Pennsylvania and delivered to him approximately 55.39 grams of methamphetamine.

4. On or about October 29, 1979, at Philadelphia, JOAN BAISCH received from Joseph Pellegrini $2,400 in payment for the methamphetamine.

In violation of Title 21, United States Code, Section 846.

A TRUE BILL:

_____

FOREMAN

_____

PETER F. VAIRA
United States Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL
JOAN BAISCH and		NO. 79-250
EDWARD LONEY	:	

ORDER

For the reasons set forth in the accompanying memorandum opinion, it is hereby ORDERED that defendant Joan Baisch's motion to suppress evidence is GRANTED and defendant Edward Loney's motion to suppress evidence is DENIED.

By the Court:

/s/ Van Artsdalen
J.

February 29, 1980.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NO. 79-250
EDWARD LONEY	:	SUR CHARGE: 21 USC 846, et al.

MOTION FOR JUDGMENT OF ACQUITTAL

TO THE HONORABLE DONALD W. VanARTSDALEN, JUDGE OF THE SAID COURT:

Defendant above named by his Attorney, respectfully moves the Court to order a judgment of acquittal herein on the following grounds:

1. The evidence is insufficient to sustain a conviction herein.
2. The failure to preserve Jencks Act Material and the destruction of evidence constitute a denial of due process and/or warrants an acquittal pursuant to the supervisory powers of This Court.

WHEREFORE, Defendant moves the Court to enter a judgment of acquittal herein.

Respectfully Submitted,

STEPHEN ROBERT LaCHEEN
Attorney for Defendant

January 30, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NUMBER 79-250
EDWARD LONEY	:	SUR CHARGE:
	:	21 USC 846, et al

MOTION FOR NEW TRIAL

TO THE HONORABLE DONALD W. VanARTSDALEN, JUDGE OF THE SAID COURT:

Defendant above named by his attorney, respectfully moves that the Court grant him a new trial herein for the following reasons:

1. The Court erred in ruling on the admission and exclusion of evidence, including, *inter alia:*

a. admitting evidence of the tin foil, the bottle and contents thereof, and the formulae, seized in violation of Defendant's Fourth Amendment rights;

b. admitting evidence of an offense for which Defendant was not charged;

c. admitting evidence of hearsay declarations against Defendant;

d. admitting evidence concerning a bottle and the contents thereof seized from Defendant, when the bottle and contents had been destroyed by the Drug Enforcement Administration without notice to the Defendant and in violation of DEA Guidelines.

2. The Court erred in charging the jury with regard to the law of conspiracy.

WHEREFORE, Defendant prays for a new trial herein.

Respectfully Submitted,

_____

STEPHEN ROBERT LaCHEEN
Attorney for Defendant

January 30, 1981

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	#79-250-1
EDWARD LONEY and	:	#79-250-2
JOAN BAISCH	:	
	:	TESTIMONY OF
Defendants.	:	ELLIS M. HERSHOWITZ

Philadelphia, Pennsylvania
January 15, 1980

BEFORE:
THE HONORABLE DONALD W. VanARTSDALEN, U.S.D.J.

APPEARANCES:
RUTH V. SIMON, ESQ.
Assistant U. S. Attorney
For the Government

STEPHEN LaCHEEN, ESQ.
Attorney for Defendant Loney

MARC RICKLES, ESQ.
Attorney for Defendant Baisch

EMERY C. TOMPKINS, C.S.R., R.P.R., C.P., C.M.
OFFICIAL COURT REPORTERS
Room 2722
U.S. Court House
Philadelphia, Pa. 19106

WAlnut 5-9480

E. M. HERSHOWITZ — direct:

So he told her that he didn't see him.

Q. Based on your radio call to other agents, did other agents in fact arrest Edward Loney?

A. Yes.

Q. About what time was the arrest made?

A. Just after four-fifty P.M.

Q. Did you have occasion later that evening to perform an *inventory search*?

MR. LaCHEEN: Objection to the characterization. I don't know what an inventory search means.

MS. SIMON: Perhaps, your Honor, if I would recall Agent Hershowitz after the testimony of the arresting officer.

MR. LaCHEEN: I have no problem with that. I don't know what an inventory — did somebody give you some stuff that you took from the van?

THE WITNESS: That's correct.

BY MS. SIMON:

Q. Approximately what time did you have occasion to search the possession taken from Mr. Loney?

A. After seven-thirty P.M., probably around 7:30, quarter to eight, something like that.

Q. Where did this take place?

A. In our office.

Q. What, if anything, did you find?

A. Well, there were twenty-one $100 bills wrapped with four other $100 bills, like twenty-four bills together, folded over, and there was a second stack of money which contained I think $678. This was seized by Agent Broden from Mr. Loney's pockets. Additionally, Mr. Loney's wallet was seized, keys — he had a watch and a bottle, approximately a gallon bottle of liquid was seized from the van.

Q. Did you have occasion to compare serial numbers of the twenty-four $100 bills with the money that you had given Joseph Pellegrini that morning?

A. Yes, I did. Twenty of the serial numbers matched the ones on the money list.

Q. Did you go through his wallet *pursuant to this arrest*?

A. I did.

Q. And what, if anything, did you find?

A. There were pieces of paper containing names of chemicals, prices, quantities. There was a piece of paper containing what I believe to be the formula for making P_2P.

THE COURT: Excuse me just a minute. As I understand, the motion to suppress isn't because these articles would not be admissible evidence as such, or that the police wouldn't have the right to hold this as evidence, but rather, as I understand, the only objection is that it was all the fruits of an illegal arrest.

MR. LaCHEEN: Judge, up until the last remark the witness made I would agree with you. However, the last remark he made causes me to want to perhaps argue that particular point.

THE COURT: Go ahead.

MR. LaCHEEN: We were not advised where that stuff was until it was in his wallet, but I would have an argument about that.

THE COURT: Right.

BY MS. SIMON:

Q. Did you perform a search of the vehicle that was seized?

A. I, myself, did *the following day*, at which time *I retrieved loads of tin foil strips on the floor of the truck*.

Q. Based on your experience of the DEA, what significance, if any, would strips of tin foil have?

A. Strips of tin foil are used in the manufacture of methamphetamine.

MS. SIMON: No further questions.

CROSS-EXAMINATION
BY MR. LaCHEEN:

Q. When you sent out your direction, to whom did you send it on how to stop Mr. Loney?
A. Via a two-way radio.

E. M. HERSHOWITZ — cross

Q. Where were you, in a vehicle of yours?
A. That's correct.
Q. And somewhere near 9250 Argus Road?
A. Angus Place.
Q. Angus, I am sorry.
A. Yes, Angus Place. There is an Angus Road and Angue Place.
Q. Whom did you notify to stop Mr. Loney?
A. All the agents — well, just about everybody else was — they were following Mr. Loney.
Q. How many people are you talking about, two, ten?
A. I guess there must have been — I think at least about six, maybe.
Q. Now what specific direction did you give those people?
A. What specific direction did I give them?
Q. I asked you first.
A. All I did was to notify the surveillance team. Agent Kean was the senior agent.
Q. Did you tell him to stop and paint his car green? What did you tell him to do?
A. I advised — all I did was advise them, Agent Kean, who was there following Loney, made the decision to arrest him and stop him based on what I told him.
Q. And knowing what happened previously, you gave Agent Kean certain facts and Agent Kean then made a decision to arrest, or did you tell Agent Kean that you wanted the guy arrested? What was the direction that you gave, that's what I want to know.

A. Kean already told me that if things went according to plan, you know, what we thought would happen, Loney would be arrested after, you know, after we found out that the deal went down, so *all I did after Mr. Pellegrini came out was notify them that he, in fact, got the drugs from Miss Baisch.*

Q. Now the period of time — incidentally, going to the end first, what specifically was it that you obtained — you don't know, do you, where the stuff was in the car? You don't know where the P_2P was, or somebody else did that; correct?

A. I was told where it was, yes.

Q. Based upon what you were told by somebody else, *where was the P_2P, the bottle of P_2P?*

A. *The bottle was inside an open cardboard box sitting right next to the driver's seat.*

Q. You mean on the seat next to the driver?

A. Not on the seat, I don't believe. I believe on the floor right by the driver's seat.

Q. Where the passenger's feet would be, if there had been a passenger?

A. No. I believe my understanding was that it was like *behind the passenger's seat, right next to the driver's seat,* like off to the rear slightly.

Q. *What about the tin foil, where was that found?*

A. *All over the floor of the truck. Most of it was stuck to the floor.* Apparently something had spilled in there causing the tin foil to stick to the floor.

Q. Has anybody performed tests to determine how long that was in the trunk, do you know?

A. Not to my knowledge.

Q. No way of telling?

A. Are you referring to the tin foil?

Q. Yes.

A. Not to my knowledge, no.

Q. What about the papers that we have, 12, 13, and 14 as pages. There is a piece of paper which says 40 percent — Judge, we don't have copies of the stuff.

It would be a lot easier if you had it as well.
THE COURT: That's all right.

BY MR. LaCHEEN:

Q. Do you know where this was, where this was found?
A. Wallet.
Q. Is this something you took from the wallet?
A. Yes. All those papers were taken from the wallet.
Q. Let me see, one, two, three, four, five, all five pieces of paper which comprise these two exhibits were found in the man's wallet; correct?
A. That's correct.
Q. Now you did not ask him to empty the contents of his wallet, did you?
A. No, I did not.
Q. You took the wallet from him?
A. No. Agent Broden did.
Q. *When you got the wallet, had the contents been removed, or was that something that you did?*
A. *Something that I did.*
Q. Now this was about 7:30 in the evening?
A. *7:30, eight o'clock,* somewhere around there.
Q. Was that *at DEA headquarters?*
A. That's correct.
Q. And Mr. Loney at that time was there?
A. *Mr. Loney had already been transported to the Roundhouse.*
Q. He was not striking distance of his wallet then, was he?
A. No, not at that time point, no.
Q. *What did you look in his wallet for?*
MS. SIMON: Objection, your Honor.
THE COURT. Overruled.
THE WITNESS: *I looked in his wallet for basically intelligence information.*

BY MR. LaCHEEN:

Q. Any reason *why you didn't go get a search warrant* if you wanted to look in his wallet?

A. Well, I didn't think it was necessary based on the fact that *it was seized pursuant to his arrest.*

Q. I can't ask you anything else on that issue.

Your surveillance started at about nine o'clock in the morning some time?

A. No. My surveillance was later, approximately ten o'clock.

Q. You started by meeting Pellegrini at Gino's, had conversation with him, and then he went his way and you went to your surveillance or something like that; is that correct?

A. Yes. He went inside.

Q. I want to get a little summary before I start asking you some questions. I am not trying to lead you into a trap.

Basically he was at the house three times on that day, each time for something like five or ten minutes; is that correct?

A. He was there three times, yes.

Q. And you were surveiling 9250 Angus at what period of time, if you recall?

A. I was there each and every time that he, Mr. Pellegrini went in. I was also there for some time after,

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	NO. 79-00250-002
EDWARD LONEY	:	POST TRIAL MOTIONS

Philadelphia, Pennsylvania
April 1, 1981

Before HON. DONALD W. VanARTSDALEN, J.

APPEARANCES:

L. MARC DURANT, ESQ.,
Assistant United States Attorney
For the Government

STEPHEN LaCHEEN, ESQ.,
Counsel for the Defendant

Emery C. Tompkins, CSR, RPR, CP, CM.
OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106
WAlnut 5-9480

THE COURT: I believe that this case presents at least two rather close questions. The one is my pretrial ruling on the suppression of the evidence as to what was found in the wallet taken from the defendant at the time that he was arrested, although the search took place sometime thereafter, and was according to Officer Hershowitz, not an inventory search, but a search for evidence, and, in fact, there was a formula obtained there, which there was testimony was a formula for making P2P, which was relevant, and certainly was a factor in the evidence in this case for which the jury may have given considerable attention.

I denied the motion to suppress largely on the basis of United States vs. Edwards, 415 U.S. 800, decided in 1974.

There have been cases from the Supreme Court of the United States since that date, that I think present serious questions as to the ruling that I made; Arkansas vs. Sanders, 442 U.S. 753; United States vs. Chadwick, 433 U.S. 1, being two of the primary ones.

Also I think that some of the language in the very recent case, from the Court of Appeals, of United States versus James Bush, et al., this is involving a forfeiture of currency, and the forfeiture of motor vehicle, which is somewhat of a different situation, in which the court filed an opinion on March 24, 1981. It would be docketed, I believe, as slip opinion 80-1116, 1168, 1751, and 1761, in which they upheld a search, although I said in that case it involved a question of a forfeiture, which is quite a bit different situation than what we have here.

Nevertheless, until there is some clear decision from the Court of Appeals, I will abide by the decision that I heretofore made, and therefore the motion to grant a new trial, or to dismiss the indictment by reason of having allowed that evidence to come in will be denied.

The other issue is the question of the destruction of evidence, or potential evidence, being a bottle containing what was testified to as P2P, that was seized at the time of the arrest.

I have previously held that the seizure was proper. I abide by that and continue to abide by that prior ruling that I made.

It appeared at the time of the trial that the bottle was, shortly before the trial, the contents of the bottle and the bottle were destroyed deliberately by the DEA agents, apparently as a matter of routine operation, but in direct violation of a departmental directive that had come down shortly before, but approximately two months before, that before such evidence should be destroyed, counsel for the defendant should be notified, and clearly there was no notification.

I don't know whether this made any difference in the outcome of the case. I doubt very seriously that it did, but that really is not the proper test. I think the sole question, in view of the fact that there are many cases that have held that destruction of evidence, through negligence, or bureaucratical error, and at least where it's not done deliberately for the purpose of preventing evidence that he wished to have, have held that this does not require a sanction such as dismissal of the charges.

There is no evidence in this case that the destruction was for the purpose of gaining some tactical advantage in the course of the trial.

It seems to me that violation of administrative regulations, although they may be condemned and there may be certain rights that they have, I don't think that that creates any type of due process right in the defendant, and certainly under United States vs. Morrison, it would not in any event, justify the dismissal of the indictment.

Conceivably it could lead to the suppression of any evidence concerning the bottle or the contents of the bottle, by reasoning analogous to the so-called exclusionary rule, or the excluding of evidence that is improperly obtained.

However, I don't think that that would apply because the rule of excluding evidence that has been illegally or improperly obtained has ordinarily been applied only where it has been obtained in some unconstitutional way, such as by an illegal search and seizure.

I don't think that mere violation of regulations, departmental regulations, would be sufficient to justify, for that reason alone, the suppression of the evidence, and therefore, although, again, I think that it is a question not without doubt, I will deny the motion for a new trial, and/or dismissal of the indictment.

Now the defendant has raised certain other issues. I have considered all of them. I don't think that they are a proper basis for the granting of a new trial, or of a dismissal of the indictment.

So far as the question on the admissibility of the statements of Joan Baisch, I think it is clear that when all of the evidence is viewed in this case, there was sufficient evidence of the existence of a conspiracy, and there was also sufficient evidence of the fact — independent evidence — of the fact that Mr. Loney was the person who delivered the controlled substance to Joan Baisch, and I think from that the circumstances are such as to justify a jury, in finding beyond a reasonable doubt, that, in fact, he was a co-conspirator.

Certainly I think the evidence was sufficient at that point, or all of that independent evidence was sufficient to permit the statements of Joan Baisch that she made, which were clearly, if there was a conspiracy, were clearly made during the course of

the conspiracy, and as part of the conspiracy, when she telephoned to Ed's Steak House. In that connection, of course, there was clear evidence, or there was evidence, at least, that Mr. Pelligrini, I believe it was, actually saw the named steak house with some phone number, that Miss Baisch examined and looked at before dialing the number when she made the telephone call to a person whom she identified at that time, I believe, only as Eddie.

Consequently the motion for a new trial and for dismissal of the indictment will be denied.

Now I did not, in this case, order a presentence report as of yet. I will presently order and direct that a presentence report be obtained, and I would like to set a date for sentencing.

Will you be here April 28th?

MR. LaCHEEN: I would have come back three days before that. How about the first week of May, if that's not inconvenient.

THE COURT: I want to conclude it the last week of April.

We will set sentencing for Tuesday, April 28, at 2:00 p.m.

Now I have another sentencing at 1:30, and I think it will be done by 2:00 p.m.

MR. LaCHEEN: Thank you, Your Honor.

Would Your Honor continue Mr. Loney's bail?

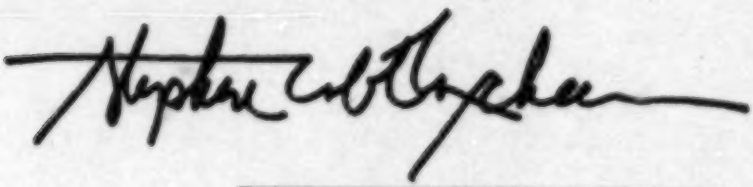
THE COURT: Mr. Loney will remain on bail as heretofore, unless there is some application by Mr. Durant. I assume there is none?

MR. DURANT: No, sir.

THE COURT: I believe there were

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that three copies of the Petition for Certiorari to the United States Court of Appeals for the Third Circuit and Appendix thereto were served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the mail, first class postage prepaid, on this date.



STEPHEN ROBERT LaCHEEN
ANNE M. DIXON
Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the Fourth Amendment permits law enforcement officials to examine the contents of a wallet that has been seized from an arrestee's person at the stationhouse in the course of booking him on criminal charges.

2. Whether law enforcement officers were required to obtain a warrant before conducting a chemical analysis of a liquid substance contained in a jug seized from petitioner's van at the time of his arrest.

3. Whether the trial court properly admitted co-conspirator hearsay statements.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2264

EDWARD LONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A-1 to A-2) is reported at 676 F. 2d 688 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1982 (Pet. App. A-2). A petition for rehearing was denied on May 10, 1982 (Pet. App. A-3). The petition for a writ of certiorari was filed on June 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiracy to distribute methamphetamine and of the underlying substantive offense, in violation of 21

U.S.C. 841 and 846. He was sentenced to concurrent terms of five years' imprisonment on each count (C.A. App. A-6).[1] The court of appeals affirmed (Pet. App. A-1 to A-2).

Prior to trial, the district court denied petitioner's motion to suppress evidence, including the contents of his wallet and the contents of a brown jug seized from his van at the time of his arrest (Pet. App. A-14; C.A. App. A-10 to A-21). The evidence at the suppression hearing and at trial showed that in the morning of October 29, 1979, Joseph Pelligrini, a paid government informant who had been supplied with $3,000 in marked bills by DEA Agent Hershowitz, went to the home of co-defendant Joan Baisch to negotiate the sale of methamphetamine.[2] Baisch did not have a supply of methamphetamine on hand, however, and she told Pelligrini to wait until she called "Eddie," her source, at one of his two steak shops (Jan. 14, 1981 Tr. 9-12). After dialing a number listed on an advertising circular for "Ed's Steaks," Baisch asked the party on the other end of the line whether he could supply her with two ounces of methamphetamine and she also inquired about the price.[3] Baisch then quoted to Pelligrini a price of $1,200 an ounce, which he said was acceptable. After she concluded her telephone conversation, Baisch told Pelligrini to return at 2:30 p.m. to pick up the drugs. Pelligrini handed her $2,400 in marked money as payment for the two ounces (*id.* at 12-17).

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[1] "C.A. App." refers to the appendix in the court of appeals.

[2] Baisch was charged with conspiracy together with petitioner, but the charge against her was dismissed when the district court suppressed as to Baisch evidence obtained as the result of a warrantless entry into her home to effect her arrest (C.A. App. A-10 to A-14).

[3] DEA agents surveilling "Ed's Steak Shop" testified that petitioner was inside the store at the same time Baisch telephoned to discuss the drug deal (Jan. 14, 1981 Tr. 107).

Pelligrini contacted Baisch several times that afternoon to inquire whether the drugs had arrived. Each time Baisch told him that the drugs were on the way (Jan. 14, 1981 Tr. 17-20).[4] Agents stationed in the vicinity of Baisch's house saw petitioner enter at 4:25 p.m. and leave ten minutes later (*id.* at 109). After petitioner had departed, Pelligrini went to Baisch's house and Baisch handed him the methamphetamine. Baisch asked whether Pelligrini had seen "Eddie" on his way out when Pelligrini arrived to pick up the drugs. Pelligrini said that he had not (*id.* at 20-25).[5]

Petitioner was arrested after his van was stopped by DEA agents several miles from Baisch's house. Inside the van, agents discovered a one-gallon brown or amber colored jug with no label on it.[6] One of the agents detected the odor of P2P (phenyl 2 propanone), a precursor chemical for the manufacture of methamphetamine, emanating from the jug (Jan. 14, 1981 Tr. 110-111; Jan. 15, 1981 Tr. 60). Subsequent analysis disclosed that the liquid inside the jug was indeed P2P (Jan. 19, 1981 Tr. 36). Another DEA agent later discovered foil strips on the floor of the van (Jan. 16, 1981 Tr. 18).[7]

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[4]During the course of one telephone conversation, Baisch told Pelligrini that she had contacted "Ed Loney," that he had in turn contacted his source for the drugs, and that he would be at her house with the drugs at 4 p.m. (Jan. 14, 1981 Tr. 19).

[5]Pelligrini in fact had seen petitioner driving a green van in a direction away from Baisch's house as he was driving toward her house to pick up the drugs (Jan. 14, 1981 Tr. 20-21).

[6]DEA agents who had been following petitioner earlier that day saw him receive the jug from a man in a white Cadillac and place it in his van (Jan. 15, 1981 Tr. 24-25).

[7]A DEA chemist testified that P2P is always stored in a colored bottle because it is light-sensitive and direct sunlight would decompose the chemical. In addition, the chemist explained that tin foil is normally used as a catalyst in the manufacture of methamphetamine (Jan. 19, 1981 Tr. 36-37, 40-41).

Immediately after his arrest, petitioner was transported to DEA headquarters, where DEA agents conducted a thorough search of his person. In the course of the search, Agent Broughton discovered and seized two bundles of money from petitioner's pocket; one bundle contained 24 $100 bills. Broughton also looked through petitioner's wallet in the course of inventorying petitioner's possessions and found several pieces of paper with writing on them. He placed the papers back into the wallet and turned the wallet and the money over to Agent Hershowitz (Jan. 14, 1981 Tr. 112-115). Several hours later, Agent Hershowitz examined the wad of 24 $100 bills and discovered that the serial numbers on 20 of them matched those given to Pelligrini. Hershowitz also reviewed the papers in petitioner's wallet, which contained notations of names of chemicals and a formula for manufacturing P2P (Pet. App. A-18 to A-19). Agent Hershowitz stated that he looked in petitioner's wallet "for basically intelligence information" (*id.* at A-22).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the warrantless search of his wallet conducted by Agent Hershowitz violated the Fourth Amendment. This contention does not warrant review.

To begin with, even if petitioner's rights were violated by the search of his wallet, the introduction of the evidence discovered as a result of the search may be disregarded as harmless error in light of the overwhelming nature of the other evidence of petitioner's guilt. The circumstances surrounding Baisch's telephone calls to petitioner's steak shop to discuss the purchase of methamphetamine, petitioner's presence at Baisch's house minutes before Baisch handed the drugs to Pelligrini, and the seizure from petitioner's person of the marked money that Pelligrini had previously given to Baisch all point directly to petitioner as Baisch's source for the methamphetamine that she sold to Pelligrini.

The notes found in petitioner's wallet were clearly of little or no significance in comparison with the other persuasive evidence against petitioner.

Second, although the permissibility of searches of an arrestee's wallet at the stationhouse presents an interesting question of Fourth Amendment law that perhaps might warrant review in an appropriate case, this is not such a case. Because the courts of appeals thus far have uniformly upheld such searches (see page 6, *infra*), and because the court below affirmed petitioner's conviction by judgment order without writing an opinion, this case presents a poor vehicle in which to address the Fourth Amendment issue.

Moreover, petitioner's Fourth Amendment claim is without merit. Petitioner chooses to focus his attack on the second search of the wallet, which occurred several hours after petitioner had been taken into custody. But the contents of petitioner's wallet had already been examined in the course of inventorying petitioner's possessions shortly after his arrest. Because the initial search of the wallet was proper, the subsequent reexamination of the wallet's contents did not invade any area in which petitioner retained a substantial, independent privacy interest.

It is well settled that once a suspect is arrested on probable cause, a full search of his person in reasonable under the Fourth Amendment. See *United States* v. *Robinson*, 414 U.S. 218, 235 (1973); *New York* v. *Belton*, 453 U.S. 454, 459 (1981). The mere fact of a lawful arrest operates to reduce, if not eliminate altogether, any legitimate expectation of the privacy of his person that the arrestee may have enjoyed prior to the arrest, and justifies the search of any object, such as the cigarette case in *Robinson*, found on the arrestee's person.

This reduced expectation of privacy in an arrestee's person remains after he is transported to the jailhouse:

> "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."

United States v. *Edwards*, 415 U.S. 800, 808-809 (1974), quoting *United States* v. *DeLeo*, 422 F. 2d 487, 493 (1st Cir. 1970). Thus, under *Edwards*, any search of the arrestee's person which could have been conducted contemporaneously with the arrest can also be conducted some time later at the station house.

This principle applies not only to searches of clothing worn by the arrestee, as in *Edwards*, but also to searches of articles, such as wallets, carried in the pockets of the arrestee's clothing. Accordingly, the courts of appeals that have addressed the question have consistently upheld the search of an arrestee's wallet at the stationhouse after the arrestee has been taken into custody. See *United States* v. *McEachern*, 675 F. 2d 618, 622 (4th Cir. 1982); *United States* v. *Passaro*, 624 F. 2d 938, 943-944 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *Ziller*, 623 F. 2d 562 (9th Cir.), cert. denied, 449 U.S. 877 (1980); *United States* v. *Phillips*, 607 F. 2d 808, 809-810 (8th Cir. 1979); *United States* v. *Castro*, 596 F. 2d 674, 677 (5th Cir.), cert. denied, 444 U.S. 963 (1979); *United States* v. *Sheehan*, 583 F. 2d 30, 31-32 (1st Cir. 1978).[8]

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[8]But see *United States* v. *Monclavo-Cruz*, 662 F. 2d 1285 (9th Cir. 1981), where the court held that the warrantless search of the defendant's purse at the stationhouse violated the Fourth Amendment. While we believe that *Monclavo-Cruz* was wrongly decided, and that police should be permitted to examine the contents of an arrestee's purse as part of the booking process, that case is of no help to petitioner because the Ninth Circuit in that case expressly reaffirmed its earlier decisions (*United States* v. *Passora, supra; United States* v. *Ziller, supra*) upholding searches of wallets at the stationhouse. 662 F. 2d at 1290.

Petitioner's reliance on *United States* v. *Chadwick*, 433 U.S. 1 (1977), is misplaced. Petitioner fails to distinguish between an arrestee's expectation of privacy with respect to his person following his arrest and the separate expectation of privacy that an arrestee enjoys with respect to possessions within his immediate control. Although containers within an arrestee's immediate control may be searched without a warrant contemporaneously with the arrest under a search incident to arrest rationale (see *Chimel* v. *California*, 395 U.S. 752 (1969); *New York* v. *Belton*, *supra*), a search of such objects may not be justified as incident to arrest if it is remote in time and place from the arrest. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 15. In contrast, as *Edwards* makes clear, a search of the person of an arrestee may be undertaken at a time and place removed from the arrest itself.[9]

2. Petitioner next argues (Pet. 10-11) that his Fourth Amendment rights were violated when the agents, without first obtaining a warrant, subjected to chemical analysis the contents of the jug that had been seized from his van. This claim is also without merit.

Petitioner does not challenge the seizure of the jug. Instead, he argues that a warrant was required before the jug could be opened and its contents analyzed. No warrant was needed to open the jug, however, since it was discovered

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[9]This distinction, between searches of the arrestee's person and searches of objects within his control, was explicitly recognized in *Chadwick*, where the Court stated (433 U.S. at 16 n.10):

> Unlike searches of the person, *United States* v. *Robinson*, 414 U.S. 218 (1973); *United States* v. *Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest.

in the course of a lawful search of petitioner's vehicle. See *United States* v. *Ross*, No. 80-2209 (June 1, 1982). A strong odor of P2P, an ingredient essential to the manufacture of methamphetamine, was detected inside petitioner's van. The agents traced this odor to the translucent jug, which contained a liquid substance. In these circumstances, the agents were justified in opening the jug for further inspection.

Nor were the agents required to obtain a warrant before analyzing the liquid inside the jug. We note that if petitioner's claim had merit, virtually all drug cases that have heretofore been prosecuted would have entailed Fourth Amendment violations, since once law enforcement officers are legally in possession of drugs, they routinely subject them to chemical analysis before trial without obtaining a warrant or consent for such procedure.

In any event, once law enforcement officers are lawfully in possession of a druglike substance, its owner has no significant residual privacy interests in avoiding chemical analysis of the substance. See *Cardwell* v. *Lewis*, 417 U.S. 583 (1974), in which the plurality held that once law enforcement officers had legally seized the defendant's car, they required neither a warrant nor consent to remove paint samples from that car in order to compare them with paint that had been found in the car of the victim. Moreover, we doubt that petitioner had any legitimate expectation of privacy in the liquid contents of the jug. The substance was left in a translucent bottle in plain view inside petitioner's van. In these circumstances, a warrant was not required before the contents of the translucent container were analyzed to determine their chemical composition. See *People* v. *Adler*, 50 N.Y.2d 730, 737 n.4, 409 N.E.2d 888, 891 n.4, 431 N.Y.S.2d 412, 416 n.4, cert. denied, 449 U.S. 1014 (1980).

3. Petitioner argues (Pet. 11-14) that Baisch's statements were inadmissible as co-conspirator declarations because, in petitioner's view, the government failed to prove by a preponderance of independent evidence that a conspiracy existed between Baisch and petitioner. This argument is insubstantial. Contrary to petitioner's claim, the independent evidence was more than sufficient to justify the admission of the co-conspirator's declarations against him under Fed. R. Evid. 801(d)(2)(E).

DEA agents observed petitioner at Ed's Steak Shop at the same time that Baisch called a number listed on a circular for "Ed's Steak Shops" to inquire about Pelligrini's purchase of methamphetamine. In addition, petitioner appeared at Baisch's house moments before she gave the methamphetamine to Pelligrini. When they arrested petitioner, the agents discovered in petitioner's pocket virtually all of the marked bills with which Pelligrini had purchased the methamphetamine from Baisch, and they found the gallon jug containing P2P, a methamphetamine precursor, in petitioner's van. Although petitioner asserts (Pet. 12 & n.4) that the evidence shows at most that petitioner agreed to sell methamphetamine to Baisch, one can hardly fail to infer from the large quantity of drugs involved in the transaction that petitioner and Baisch contemplated that the drugs would be distributed by Baisch to one or more third party purchasers. In sum, a fair preponderance of independent evidence established that petitioner participated in a drug conspiracy with Baisch to distribute methamphetamine. Accordingly, the district court properly admitted into evidence Baisch's out-of-court statements made in the course of and in furtherance of the conspiracy, in which she identified petitioner as her source.

Petitioner further argues (Pet. 14) that the admission of Pelligrini's account of Baisch's out-of-court declarations denied him an opportunity to confront Baisch, in violation of the Sixth Amendment. This claim is also without merit.

Here, the reliability of the evidence "can be inferred without more" by virtue of the fact that "the evidence falls within a firmly rooted hearsay exception." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980). Moreover, the challenged evidence bears sufficient " 'indicia of reliability' " to afford " 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.' " *Mancusi* v. *Stubbs*, 408 U.S. 204, 216 (1972), quoting *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion; citation omitted). Baisch's statements were made at a time when she had no reason falsely to inculpate herself or others. She had known Pelligrini for years and had no knowledge that he was a government informant. The courts of appeals have consistently accepted similar indicia as a basis for finding co-conspirator hearsay statements sufficiently reliable to satisfy confrontation clause concerns. See *United States* v. *Kendricks*, 623 F. 2d 1165, 1167-1168 (6th Cir. 1980); *United States* v. *Archbold-Newball*, 554 F. 2d 665, 677 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Papia*, 560 F. 2d 827, 836 n.3 (7th Cir. 1977); *United States* v. *Goodman*, 605 F. 2d 870, 876-878 (5th Cir. 1979).[10]

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[10]Petitioner's reliance (Pet. 14) on *Bruton* v. *United States*, 391 U.S. 123 (1968), is misplaced. In *Bruton*, the co-defendant's post-arrest confession was not admissible as to Bruton under any applicable exception to the hearsay rule, and this Court noted the critical weight of the particular evidence in the setting of that case. 391 U.S. at 128. The Court emphasized, however, that it "intimate[d] no view whatever that * * * exceptions [to the hearsay rule] necessarily raise questions under the Confrontation Clause." *Id.* at 128 n.3. The admissibility of the out-of-court declaration in this case under Fed. R. Evid. 801(d)(2)(E) serves to distinguish this case from *Bruton*. See *Ohio* v. *Roberts*, *supra*, 448 U.S. at 65-66; *Dutton* v. *Evans*, *supra*, 400 U.S. at 85-87 (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1982

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No. 81-2264

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EDWARD LONEY,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

Petitioner's Fourth Amendment rights were violated when federal agents conducted a warrantless search of his wallet several hours after it had been seized from him incident to arrest and reduced to the agents' exclusive control.

Respondent argues in its Brief, at Page 6, that the search of LONEY'S wallet was justified pursuant to several decisions of the Courts of Appeal. However, none of these decisions, even if followed by this Court, is dispositive of the issue here. For example, in *United States v. Passaro*, 624 F.2d 938 (CA 9 1980), cert. denied, 449 U.S. 877 (1981) the Ninth Circuit relied upon the Supreme Court's decision in *United States v. Edwards*, 415 U.S. 800 (1974), in concluding that a defendant's wallet may be *seized* from him at the place of detention, and its contents searched. In so doing, the Court noted:

> "In EDWARDS, the defendant was arrested for the attempted break-in. After investigation of the scene revealed that a pry bar had been used on a window sill, the authorities decided to examine the defendant's clothing. The Court held that the warrantless search and seizure of the clothing did not violate the Fourth Amendment, and that once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched without a warrant . . ." *United States v. Passaro*, supra, at page 943-944.

Thus, both *Edwards* and *Passaro*, as well as all of the other cases cited at Page 6 of Respondent's Brief, involved searches of items still in the defendant's possession at the place of detention, while here, the item searched, LONEY'S wallet, had been seized and reduced to the exclusive possession of federal agents hours earlier, at the time and place of his arrest.

This distinction acquires added significance when considered in light of the decision in *United States v. Monclavo-Cruz*, 662 F.2d 1285 (CA 9 1981). In that case, the Ninth Circuit held that the Warrant Clause was violated when authorities seized the defendant's purse at the time of her arrest, but delayed the search thereof until arriving at the initial place of detention. In distinguishing *Passaro*, the Court placed much reliance upon the fact that "the *Passaro* court characterized the wallet of the arrested person as an 'element of his clothing.' *Passaro*, supra at 944." *United States v. Monclavo-Cruz*, supra, at page 3363. No such characterization could be made of LONEY'S wallet when it was securely in federal agents' possession at the time of search thereof. See *United States v. Fleming*, 677 F.2d 602 (CA 7 1982).

Respondent also suggests that the stationhouse search of LONEY'S wallet was proper because the arresting agent had previously examined the contents of the wallet shortly after LONEY'S arrest. However, that testimony was not introduced at the suppression hearing, and was not before the district court at the time of denial of LONEY'S motion to suppress.

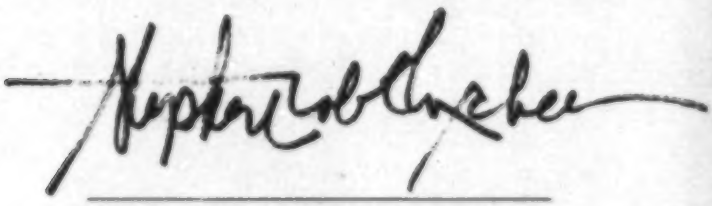
Respondent further argues, even if the search of the wallet was unlawful, the admission of evidence concerning its contents, formulae for chemicals used in the manufacture of methamphetamine, was harmless error. It ill behooves Respondent to make such an argument at this juncture in view of Respondent's comment on this evidence twice during closing argument (January 2, 1981 Tr. 5, 23), its assertion at Page 11 of the appellate brief that evidence of the formulae "make(s) it more likely that LONEY distributed methamphetamine than in the absence of such evidence", and its concession at oral argument before the Court of Appeals that admission of the chemical formulae did not constitute harmless error.

Accordingly, the search of LONEY'S wallet violated his Fourth Amendment rights, and the fruits of such illegal search should not have been admitted into evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment of the United States Court of Appeals for the Third Circuit, which affirmed without discussion a Judgment of the United States District Court for the Eastern District of Pennsylvania.

Respectfully Submitted,



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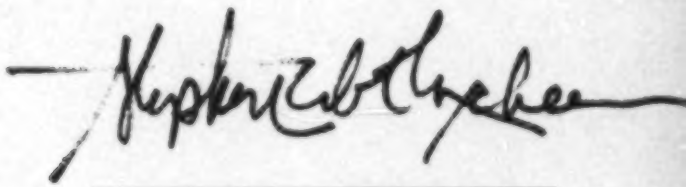
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of Petitioner's Reply to Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Third Circuit and Appendix thereto were served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the mail, first class postage prepaid, on this date.



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